SPEECH

OF

HON. THOMAS WILLIAMS,

OF PENNSYLVANIA,

Delivered in the United States House of Representatives, January 13th, 1868.

On the bill declaring what shall constitute a quorum of the Supreme Court, and to regulate the jurisdiction thereof.

Mr. WILLIAMS, of Pennsylvania. The object of the amendment reported by the committee to the Senate bill is to preserve this Government in its original spirit, and protect its people in the enjoyment of the rights intended to be secured to them by its fundamental law, by protecting that law as well against the encroachments of the States as from the ambition or infirmities of its accredited expounders, acting through the more insidious and alarming process of judicial construction, which is so often but another name for judicial legislation.

The purpose of the amendment just offered by me, which is no other than a copy of the bill that, under a feeling of profound alarm for the tranquility of the nation and the preservation of the just balances of the Constitution, was introduced by me into the last Congress, and again renewed and referred upon the inauguration of the present one, is to make that protection sure by exacting the highest security that the authority of Congress can demand and the nature of the circumstances will admit.

To this end it provides that not less than a full bench shall sit in judgment upon the will of the people as declared through their Representatives, and that nothing short of the consentaneous agreement of the favored few, holding their places by appointment of the Executive, shall nullify that will, by breaking the scepter of the law-giver, and striking his ordinances dead at his feet.

The amendment of the committee, while it accepts and incorporates the principle enunciated in my bill, and so far challenges my approval, reduces the security provided for by it by compromising on a two-third vote, which, under the present constitution of the Supreme Court, would add one voice only to the number now required to undo the work of Congress, and give, perhaps, a new law to the people; and in this, I think, falls short of the necessities of the case and the high requirements of public duty.

The difference, then, is only one of measure or degree—a mere question of more or less—between the highest possible security and an inferior or lower one. And here, I think, it may be affirmed with confidence that the legislator, holding, as he does, a public trust, and not dealing upon his own account or for his own private interests alone, has no absolute discretion, no choice, indeed, but to take the higher and superior. Assuming the need of a guarantee for the the public safety, he cannot, in my judgment, demand too much; his only question is what is within the range of the possible. When the great interests—perhaps the life—

of a nation are involved, I take it to be his clear duty to waive no security, but to

"Make assurance doubly sure,
And take a bond of fate."

The point once admitted, as it is here, that we may require any more than a majority, the whole question is surrendered. If we may exact two thirds it is transparent that we may exact the whole. And who shall say, if we may do this, that the lowest security which the country shall enjoy shall be less than the unanimity of the jury box? If that is practicable, why not insist upon it.

To these questions there can be no answer except that it is unreasonable, or inexpedient and unnecessary. But is this so? Let us examine.

It is not certainly unreasonable to insist that if the judgments of perhaps two hundred representative men, of the *elite* of the nation, drawn mainly from the legal profession, and embodying a large portion of its wisdom and experience, are to be overruled by a little conclave of some seven or eight not chosen by the people at all, and no wiser or better than themselves, the oracle whose nod is claimed to be equal to the stamp of fate shall give out no discordant utterances. The wisdom of that common law which was claimed by our ancestors as their birth-right has ordained that the life, and liberty, and property, even of the humblest citizen, shall not be taken away without the unanimous verdict of a jury of his peers. Who shall say that the life of a great State, the liberties of a great people, are not entitled to the same protection, and that four or five men out of a body so constituted—nay, even a bare majority of those four or five—shall determine in the last resort, and without any appeal whatever, the extent of its own charter of freedom, in defiance of the sense of the millions who, under all the forms of the Constitution, have declared their sovereign will?

I did not regard it as unlikely that the proposition, which I had the honor to introduce nearly a year ago, would startle the profession at first sight as an alarming innovation, and I am not sure that this expectation has been entirely disappointed. It could scarcely in the nature of things be otherwise. Lawyers, who run in grooves, and are educated into a superstitious reverence for precedents, and so often—I may say so proverbially—fail as statesmen, because they lack the bold, original, and progressive spirit of a Mansfield, are always averse to untried ways, and always ready to denounce the idea of reform or change, whenever it goes to matter of substance and beyond any mere question of form, as a pernicious novelty. Men of this sort will say, perhaps, that there is no case where unanimity of sentiment has ever been demanded at the hands of any tribunal on a question as to the meaning or effect of a covenant or a law, and taking their position there, maintain that the thing is improper only because there is no precedent to warrant it.

And yet if the law, as claimed by its professors, is only reason and the very perfection of it, and if what is not reason is not law, it will be found, on the application of this test, that there is nothing in the requirement of unanimity to conflict with that idea. Whatever weight considerations of mere convenience may be entitled to in ordinary cases upon questions of merely private right between man and man, it cannot certainly be affirmed that there is anything unreasonable in the proposition that unanimity of opinion shall be required where the tribunal is a small one, and it is sought to overthrow the judgment of the millions, speaking through another and greater organ, on a matter that concerns the well-being of the whole, and perhaps the very existence of the State. The lawyer who cherishes the old and favorite hypothesis, that what we every day realize to be the most uncertain of all things is always absolutely certain, cannot very consistently complain that the meagre priesthood, which ministers at the shrine of an oracle that claims to be infallible, should be expected to give out no divided responses, and scatter no ambiguous voices among the worshippers, but, on the contrary, on all vital questions at least, should blend all its outgivings into one sublime chorus of universal harmony. In matters of faith, where the idea of infallibility is the rule, such consentaneity is indispensable. If the successors of the fisherman, along with the triple crown had worn a triple head, the prestige of infallibility must soon have disappeared. With seven or eight heads the faith must necessarily have perished under any other rule than that which is proposed to be enacted here.

It is only necessary to remind the lawyer himself that there is an analogy to this in that time-honored institution, the trial by jury, which, although generally referred to the great charter of English liberty, antedates the records of our race, and is imbedded in all our constitutions as the palladium of all our rights—the one great pre

eminent defense of private and public liberty. It was not enough that the person and property of the citizen should be walled round by the protection of his peers. Even that security was treated as inadequate without the unanimity that constitutes its excellence. It was still possible that seven men out of twelve might be warped by prejudice, misled by ignorance, imposed on by cunning, corrupted by money, or seduced or overawed by power. The life and liberty and property of the citizen were not to be trusted to the keeping of the majority, or taken away except by the unanimous accord of all his judges, passing in criminal cases as well upon the law as upon the facts. It is the glory of England, as it is the boast of America, that not one of the great natural rights, whose protection is the only legitimate object of all government, shall be disturbed, even in the smallest particular, without the unanimous judgment of a larger bench than that which claims to pass, by a divided vote, upon the fundamental law of a great nation, and in effect to nullify that law, or to make it speak in accordance with its own imperial behests. Who, then, shall say that there is in this amendment anything unreasonable or unprecedented, or any departure from the analogies of our Constitution; or that a nation may not borrow in its extremity, for the preservation of its life, the securities it has already thrown around the humblest individual and the lowliest home?

If there is anything that is transcendently and indefensibly unreasonable, it is in the idea that it should be competent for even any seven or eight men, however exalted, and with like passions and infirmities as ourselves, either to legislate away by construction the great charter of our liberties, or to set aside the decrees of the high council of the nation, embodying, as it always does, a large share of the intelligence and all of the majesty of a great people, and in effect to bind everybody but itself. That is an anomaly necessary, necessitated, perhaps, by the fact of a written Constitution, but still an anomaly that may well startle us, in view of the possibilities that are so strongly suggested by the present condition of the nation, wherein its highest judicial tribunal is invoked and depended upon, as a powerful, nay, a resistless auxiliary in the war waged by the Executive against the power that is entrusted under the Constitution with the making of its laws. There was a time when it was seriously doubted whether there was any authority in the States or the United States that could declare an act of the law-making power to be invalid because it conflicted with the constitutions of either. That question has been settled affirmatively on grounds that may be, perhaps, conceded to be unanswerable, and which I will not, at all events, attempt to controvert. It was apparently the logical and necessary result of an antagonism between a superior law and an inferior one, which could not be reconciled without the surrender of one or other of them. If the fundamental, and of course the higher law was not to prevail in such a strife, the Constitution became valueless as a limitation, which it was intended to be. It was not without reason, however, as we have occasion from very recent experience to know, that the jealous and watchful and sagacious Jefferson referred again and again to the power claimed for that tribunal, as involving the establishment of a judicial oligarchy in the land.

We look in vain to the country from which our institutions are derived for any example of such a power as this over its constitution and laws. The royal negative, it is true, may suspend the action of the legislative body, although in point of fact that prerogative has slept for nearly two hundred years, but it settles nothing in regard to the powers of that arm of the Government, and only stays its operation until the might of public opinion comes back to bend even royalty itself before it. No British court, even the most ancient and venerable, with all its historic prestige and all its array of learning, has ever ventured to set limits to the authority of the law-giver. The appeal is not there from Parliament to the courts, but practically from the courts themselves to Parliament, as the highest of them all. And well and faithfully has that great depository of the unwritten laws and customs of England, which constitute the safeguard of the liberties of its people, observed and performed that responsible and exalted trust. In the custody of the courts they would have sickened and died under the withering influence of royal favor. The history of that nation proves abundantly that in all the struggles between prerogative and privilege the supplest instruments of tyranny have been the judges. But to the honor of the Legislature be it said, that no decision has ever been made by them which violated the instincts of the Saxon race, by breaking down its landmarks, or traversing its great maxims of liberty, by impinging upon the natural rights of the subject, that has not been eventually reversed by the Commons

of England in Parliament assembled. And thus, without a written constitution, with no guides but those high instincts, those hoary and venerable customs, and those hallowed traditions of the past, which, handed down, as they have been, from sire to son from prehistoric times, make up the body of their common or customary law, the liberties of Englishmen, so wisely reserved for their own keeping, have been perpetuated from generation to generation, not only unimpaired, but enlarged, improved, developed, and strengthened by the flow of centuries. They have not learned the royal lesson of the last presidential campaign, which is still rehearsed and reiterated even here, that the danger of tyranny is from the many, or, in other words, from themselves, and that they required the vetoes of a king, or the supervisory power of a court, to instruct them as to their rights, and protect them from themselves. There have been none among their representatives so deficient in self-respect as to abase themselves in the presence of any court; none so unappreciative of their own high trusts, or so forgetful of their official dignity, as to insist, or even to concede, that there was more wisdom and learning, and virtue concentrated in any body of seven, or eight, or even twelve men in Westminster Hall, selected by the Crown, than was to be found in the multitude of counselors that represent the people of a great empire. The Parliament of England is the guardian of the liberties of England, and cannot betray those liberties without surrendering its own. And so, too, with our Constitution and all of value that it contains. When it ceases to be safe in the hands of all the people, who have a common inheritance in its provisions, it is idle to hope that it can be locked up securely under the custody of any seven or eight men outside, as so many doctors of the Sanhedrim, with the high prerogative of reading and interpreting it to the people, as the imperfect judgment or the mere caprice of a majority of them may determine. The statesman who holds that we cannot safely trust ourselves, and that our only security is in such a guardianship, surrenders the idea of self-government as a visionary and impracticable thing, and confesses that a political State cannot exist without a master. That is an ancient superstition. Wise men of old and some of modern times have entertained it. The world has generally been governed under it, often by a hierarchy. It was supposed for a long time to have been exploded here. It is now revived under the auspices of the Democratic party—once so hostile to this *regime*—in the idea that a sort of hieratic college—a priesthood of a new religion—a little oligarchy of lawyers—is the only safe depository of the supreme power of the State. The difference is only between an octarchy and a monarchy—between eight sacerdotal masters—a sort of conclave of superanuated cardinals—in wigs and gowns, and a single royal one in purple. Without disparagement to either of these high professions, and certainly with none to that to which nearly forty years of my own life have been devoted, and which is now sought by some to be enthroned at this Capitol as the absolute master of the State, I must be excused for thinking that, however flattering may be the offer of the crown to us, many people would, perhaps, prefer the purple, with all its attendant splendors, to the sable regalia of either the priest or the pedagogue.

If it has been found, however, that the liberties of Englishmen could not be safely trusted to their courts, how much less likely is it that ours, as a people, can be confided securely to the same hands here. It may be truly said of the judiciary of the mother-land, that since the era of the great Revolution, for a period now of near two hundred years, there have been no tribunals among men that have been more exempt from the frailties of humanity, and have more nearly approximated to the ideal of unerring wisdom and perfect justice; and it is to the fact that the highest honors of the profession are only accessible to the highest excellence, that there are no loftier rewards to tempt ambition, even the most restless and insatiable, and that there is a homogeneity among its people which frees it from the adulteration of foreign and inferior ethnic elements, that it is indebted for these exalted qualities. No favoritism rules in the selection of its judges. The leader in the forum steps by an admitted right of succession into the first vacancy on the bench. It is scarcely within the power of the Crown itself to disregard this rule in its appointments. To pass by the trained athletes, and single out even the greatest of the parliamentary leaders for such a place, would shock the moral sense of the whole realm. Not so, unfortunately, with us.

There is, perhaps, scarce a Congressman or Cabinet officer, who has been long enough in public life to unlearn all of law that he ever knew, whose modesty would prevent him from seeking or accepting the

mantle that has fallen from the shoulders of a Marshall or a Story. It is not to the leaders of the bar in this country that the honors of the profession are awarded, as their undisputed right; and they are, perhaps, not sought by them, for the reason that the rewards are not commensurate with the earnings of the higher class of professional men. And therefore it is that the bar is in most cases superior to the bench, as it cannot be where the usage prevails of selecting the judges from the ablest of its members; and therefore it is, too, that the spectacle of a divided court is, of late years especially, so common a thing, that unanimity is the exception rather than the rule, and lawyers themselves are startled at the idea of prescribing a condition that to them seems impossible. I take leave to say that it is no more impossible than the harmonious agreement of a jury. It is questions of fact alone that are the most fruitful sources of difference among men. In matters of pure science, as the law is sometimes claimed to be, there is no great room for controversy. High culture and thorough dicipline will go far to secure accordance in opinion. The best lawyers will be seldom found to differ where they are agreed upon the facts. It is only the pretenders, the mere sciolists, that convert what ought to be the temple of concord into an arena of perpetual strife, on the bench as well as at the bar. In the long term of thirty-two years, during which Lord Mansfield presided over the Court of King's Bench, there were, if my recollection serves me right, but two cases of division among the judges of that court—one the case of Millar *vs.* Taylor, upon the great question of literary property, and the other that of Perrin *vs.* Blake, upon the application of the rule in Shelley's case—and no reversals in the Exchequer Chamber or in the House of Lords, except in those two cases, wherein the dissenting judge was Yates, who was decided to be right in both. Another Yates might save the Constitution here against even the errors of another Mansfield by the adoption of the proposed amendment. And what is there, in view of this striking chapter of judicial history, which is only singled out by way of illustration of the general harmony that prevails in England, to prevent the achievement of the same result with us; and who is there that will consent, until it is accomplished, to trust the welfare and the very existence of this nation to such an arbitrament.

But it is not the want of professional training only that makes the difficulty and the danger here. The judge, with us, is not so much a lawyer as a politician. The chances are that his politics and not his knowledge of the law, have made him what he is; and the place he has sought and won is, perhaps, but the stepping-stone to a higher one—which he covets more—whenever he shall have recommended himself sufficiently by his conduct there, either to be President or to the party to which he owes his exaltation. Without any of the *esprit du corps*, the devotion to his proper calling, the high professional pride that always results from high professionnl training, he sinks the lawyer in the politician, and carries into the temple of Themis, where no divided worship is admissible, all the prejudice of party, and all the spirit of the local and sectional demagogue. It is idle to talk of our courts of justice as merely judicial institutions. Disclaiming ostensibly all jurisdiction over political questions, they are as thoroughly political in their texture and spirit as the two Houses of Congress themselves, over whose atmosphere of mists and storms they are supposed to float, like disembodied spirits, in the celestial light of an unclouded and unbiased reason. Turn to the history of our jurisprudence, State and national, and what do you see but the reflection of the opinions of the party which happens for the time being to have the ascendant in the courts? Fortunately, perhaps, for the welfare of this nation, before it was well hardened into the consistency of an organized State, the plastic hand of the party that favored the covenant of Union was invoked to put its impress on the work and launch it on its high career. If the old Federalist, however, carried to the bench one set of opinions, the old Republican brought with him another. With the growth of slavery the State rights Democrat, drawing his inspiration mainly from that unhallowed institution, took possession of the State and Federal courts, stealing away, even in the free Commonwealth of Pennsylvania, the chartered rights of the black man, under the miserable juggle that the word "freeman" did not mean a free man, but a white man, and maintaining its power here and in the States until that power culminated and carried the country down into rebellion and ruin, in the monstrous paradox that slavery and not freedom was the law of this Republic, and that four millions of its native inhabitants were but aliens and outlaws, with no rights that a white man was bound to respect.

When the echo of these opinions came back in the roll of the war drum, and the thunders of the artillery that shook this Capitol, the Supreme Court of the United States, startled, as it no doubt was, by the unexpected results of its own work, with one defection only, maintained its faith to the Union by adhering to the Government, affirming its powers of self-conservation, and recognizing the beligerent relations created by the war. It could not well have been otherwise. Its dignity, its power, its very existence, were involved in the preservation of that Union whose integrity was menaced by the revolt. Not so, however, with the party judges of the States. While it was no longer safe to question the power to coerce, wherever a Democratic judge was found, he was almost sure to cast his vote into the southern scale by a denial of the means, while the Republican judges of the loyal States were ever ready to enforce the legislation of the governments, both Federal and State, in aid of the war. Thus in Pennsylvania, when it was proposed to arm the soldier with suffrage in the field, in order to enable him to protect himself from "a fire in the rear," the constitutionality of the law enacted for that purpose was denied by a Democratic court. If the right of the General Government to compel the military service of its citizens in its darkest hour was sustained even upon the anomalous and extraordinary proceeding of a bill in equity to enjoin the draft, hurried to an argument against all rule before a full bench, in midsummer and out of term, while the rebel armies were thundering at our very gates, and pressing in serried columns upon the fatal field of Gettysburg, by the Supreme Court of the same State, it was only through a popular election which deposed one Democratic judge, and the defection of another, who preferred his country to his party. If the legal-tender act, which provided in the nation's extremity the sinews of war, and fed and clothed the gallant volunteers who so freely offered their young lives to the sacred cause of liberty, was saved from judicial condemnation in the same court, it was in the same way. And now it may be added, since the danger has apparently passed away, and the judges of the Supreme Court of the United States, lately united and cemented together under a feeling of common danger, have come to feel that the Federal judiciary is saved along with the Union on which it depends, they are found to divide again according to their original political connections and proclivities, upon the validity of the test-oath, the military commissions, and perhaps others of the important measures of self-preservation and defense that contributed so largely to carry us successfully through the war, while it is not to be denied, that if the authority of Congress is not absolutely menaced at this very moment from the same direction, this body at least, if not the whole country, is affected with the deepest alarm by rumors of a combination between the Executive and the courts for the overthrow of the legislative power.

Allow me to remark, however, that in what I have just said in relation to the decisions of the courts I have not intended to inquire who of the judges involved were right and who were wrong, because it is not necessary to the argument, and gentlemen on the other side, to whom it is equally addressed, might differ with me as to that. The object I have in view just here is only to make good the allegation that the decisions of the courts, on constitutional questions especially, are almost invariably governed by the party affiliations of the members, and therefore not so much the judgments of lawyers as of politicians. If the fact be so, it is, of course, and must forever be, in the mutations of party and with the ever-changing kaleidoscope of politics, entirely fatal to the idea of uniformity of decision, and nothing is ever to be settled, as nothing apparently has been settled incontrovertibly heretofore. Assuming it to be true, moreover, there is an end of all argument in support of the judgment of a divided court, if there is not an end of all apology for treating even its unanimous decisions on questions of constitutional law as conclusive upon Congress and the people when they are not even conclusive upon themselves.

It was a grave error, therefore, as I honestly think, on the part of the founders of this Republic, when they departed from the example of our British ancestors in giving place to such an anomaly, instead of reserving the ultimate judgment in all such cases to their own Representatives, or at least preserving their control over the judiciary, by the method of address by two-thirds of both Houses, which was provided in the statute of 9 William III, and has been copied by some of the State constitutions, instead of relying only on the inadequate remedy of impeachment, which corrects no error, however vital, and leaves the defaulting judge to shelter himself under the plea that he erred from ignorance only,

or without corrupt intent. To meet this difficulty, however, I have had the honor to submit a constitutional amendment to the same effect, in order to maintain the just authority of the law-making power, by bringing the Federal judiciary within the reasonable control of Congress, with such qualifications as will guard it sufficiently against abuse, which I propose to bring to the notice of the House at some more favorable opportunity.

Assuming, however, that the power of review is properly lodged with the Supreme Court, the question is whether the limition proposed would be a proper one. That it is so is, I think, demonstrable from well settled principles, and as a logical result of the decisions of the court itself.

It is admitted on all hands that questions of this sort are of great delicacy, and ought not to be even heard, except in the presence of a full bench. This is the rule in Pennsylvania, and perhaps everywhere else, and the practice of the Supreme Court of the United States is shown by the Reports to be made in strict accordance with it. (6 Wheaton.) There can be no possible objection, therefore, to so much of the bill as merely imparts the sanction of law to what is already recognised as a rule of the court.

But the rulings of the courts do not stop short with the concession of the principle, that cases of this nature ought not to be heard except before a full bench. It is still further admitted, as well by the Supreme Court of the United States as by the judicial tribunals of all the States, so far as I am acquainted with them, that no act of the law-making power ought to be declared invalid on the ground of conflict with the Constitution, except in a very clear case. (Fletcher *vs.* Peck, 6 Cranch, 128; Resp. *vs.* Duquet, 3 Yates, 493; Eakin *vs.* Rob, 12 S & R.) In the first named case Judge Marshall says, in delivering the opinion of the court:

"The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. It is not on slight implication or vague conjecture that the Legislature is to be presumed to have transcended its powers and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

And this is reason. When we look to the fact that every law enacted by the Congress of the United States must pass the ordeal of a bench of judges in the Judiciary Committee of each House; undergo public discussion and scrutiny on the floors of both; be affirmed by the votes of at least one hundred and twenty men, comprising among them a large number of lawyers of great experience and ability, and many of them at least the peers of the judges of the Supreme Court themselves, and then either approved by the President, or reviewed and reaffirmed upon objections made by a two-third vote, it would have been surprising, indeed, if the court could have held any other language in regard to it. When they say, however, that the case must be a clear one, they affirm by an inevitable logic the principle of my amendment. No case can be said to be a clear one where even one out of eight judges dissents, as no decision is regarded as an unimpeachable authority, even in an ordinary case, where there has been a division on the bench; and none *a fortiori* ought to be considered in a case of that sort as of any weight or value whatever. It may be that the dissenting judge is, as in the case of Yates, the ablest lawyer of the number, and therefore it is no unusual thing to find, as in that of Curtis in the Dred Scott case, that the dissenting opinion is the more thoroughly considered and satisfactory of the two. It is not mere brute numbers that ought to prevail in the forum of reason, or in other words, of law, which is supposed to be the perfection of it. The vulgar idea of a majority in numbers, which is only properly admissible on grounds of convenience if not necessity, because in the case of conflicting wills it is impossible that both can prevail, (1 Tucker's Black Commentaries, Appendix, 168–172; 9 Dan Abridgt 37–43 1 Story's Commentaries, section 330) has no proper place in the comparison of opinions, which are not to be tested, as Tacitus, I think, expresses it in regard to the great councils of the Germanic tribes, by numeration, but by weight. It follows, however, from the theory of the court itself, that the law, which is but the voice of the people speaking through their Representatives, is entitled to the benefit of every doubt, and ought not to be pronounced unconstitutional where there is any dissent whatever; and so they must decide if they would be consistent with themselves. The effect of this amendment therefore is only to hold them to the logical consequences of a doctrine which has been distinctly, emphatically, and repeatedly enunciated by themselves.

We are so much accustomed in this country to the idea of a majority, as the fundamental one on which all republican govern-

ment must practically rest, that we are apt to suppose that it has its own foundation in the very nature of things, and that every departure from it must do violence to the spirit of our institutions. Allow me to say that this is a great mistake. The idea is exclusively a social and political one. There is no such thing in nature as the right of superior numbers to govern the inferior. Mr. Burke, whose richly furnished, comprehensive, and philosophic mind was brought by the leading events of his time to the exploration and analysis of the great principles that lie at the foundation of all government, holds this language in his "appeal from the new to the old Whigs:"

"We are so little affected by things which are habitual that we consider this idea of a majority as if it were a law of our original nature; but such constructive whole, residing in a part only, is one of the most violent fictions of positive law that has ever been or can be made on the principles of artificial incorporation. Out of civil society nature knows nothing of it: nor are men, even when arranged according to civil order, otherwise than by a very long training, brought at all to submit to it."

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"This mode of decision where wills may be so nearly equal, where according to circumstances the smaller number may be the stronger force, and where apparent reason may be all on one side, and on the other little else than impetuous appetite; all this must be the result of a very special convention, confirmed afterward by long habits of obedience, by a sort of discipline in society, and by a strong hand vested with stationary, permanent power to enforce this sort of constructive general will. What organ it is that shall declare the corporate mind is so much a matter of positive arrangement that several States, for the validity of several of their acts, have required a proportion of voices much greater than that of a mere majority. Those proportions are so entirely governed by convention that in some cases the minority decides. The laws, in many countries, to condemn require more than a mere majority; less than an equal number to acquit. In our judicial trials we require unanimity either to condemn or absolve. In some incorporations one man speaks for the whole; in others a few. Until the other day in the constitution of Poland unanimity was required to give validity to any act of their great national council or diet. This approaches much more nearly to rude nature than the institutions of any other country. Such, indeed, every commonwealth must be without a positive law to recognize in a certain number the will of the entire body."

Now, a reference to the structure of our own political machine will show, that while the majority principle, which is but the common law, is generally recognized in public affairs as the governing one, it is not by any means the universal rule of our Constitution, and that the framers of our Government have deviated from it largely by way of check or limitation upon the possible and probable abuse of such a power, I have already referred to the trial by jury, where unanimity, which is of its very essence, is the rule. The trial by impeachment, where two-thirds are required to convict, is another case where the majority idea is departed from. Again, in the enactment of our laws, the power of the majority in either House is controlled by the dissent of the other, while both are bridled by the one-man power residing in the President, and a two-third vote of each, although comprising of themselves, by the very terms of the Constitution, the entire legislative power, is required to enable them to act effectively alone; so that it may be truly said that the rule of legislation is a two-third vote. The like majorities are required for the alteration of the fundamental law itself, along with the consent of at least three-fourths of all the States. In all these cases the majority rule is not permitted to apply, and that for the transparent reason that the great vital interests of the State and people demand a higher measure of security. So little regard, indeed, is had for this cabalistic number, which is supposed to be so full of preternatural virtue, that a departure may be witnessed even in the opposite direction, in the rule which prevails in nearly all the States in the choice of Presidents and Congressmen, at Federal as well as State elections, that a mere plurality, which is only another name for a minority, may elect to the most important offices.

If the majority principle is the rule in the courts, and generally at the ballot-box, it rests only on the same grounds of convenience that have tolerated and recommended the rule of a plurality. It is a necessity that wherever there is a diversity of opinion the larger number shall prevail if there is to be any decision at all; and therefore it is, that by the rule of the common law, which is the growth of a nation that never recognized the rule of a majority in affairs of state, a power delegated to three or more persons for a public purpose, is exercisable by a majority of the persons named, while a merely private authority cannot be executed by any number less than the whole. (6 Johnson's Report, 38.) The consequence in the latter case is, that it must fail altogether in the event of a difference of opinion, which in affairs of state would be entirely inadmissible, wherever any positive act is to be done. In the ordinary course of judicial proceedings it may be admitted that the rule of unanimity would be, if not absolutely impracticable, as I think it is, a source of endless and infinite embarrassment, and result unquestionably in the great delay, if not the absolute denial, of justice. In the case, however, of a question as to the constitutionality of an act of Congress there is no such exigency. The requirement of unanimity will only give to the law-

aking power the benefit of the favorable esumption to which no lawyer will dis- te that it is entitled, and fortify that pre- mption with the advantage of any doubt, treating its own decisions as the rule at is to govern the courts until, at least, ey shall have been reversed by the united d concurring voices of the whole of that dicatory which claims to hold a delegated wer to sit in judgment upon its authority. here will be no such inconvenience as a lure to decide. When the judges differ ey will have already decided that the law constitutional by failing to agree that it otherwise, and the law of Congress will evail, as it ought to do, whenever they nnot be brought to agree that it is wrong.

Having thus shown, as I think, the entire asonableness and propriety of the change pposed, the next and last question is as our power to effect it. And here, I think, ere is no doubt or difficulty.

In the first place, then, the Constitution ovides that—

"The judicial power shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish."

There is nothing here, however, as to the mber of judges who shall compose it; thing as to the number who shall be com- tent to pass upon such questions as may ne before it. It is unquestionable that Congress may fix the number of the court its own discretion, and it has always ne so. It is equally clear that it may determine how many of them shall be re- ired to constitute a court for business rposes, and this it has also done by de- ring how many shall be necessary to ke a quorum. As the law now stands requires more than two-thirds of that bunal, as at present organized, for this rpose. The constitutionality of that law s never been doubted by anybody. If it s valid when enacted, it is certainly not ade otherwise by the reduction that has ce taken place in the number of the dges. If it is still the law, then, by a ther reduction of the number, the now isting quorum might become the whole, d upon this argument the constitution- ty of so much of the amendment at least requires a hearing before a full bench is early demonstrated.

And now, in the second place, as to the wer of Congress to require the concur- ng opinions of the whole of what it may oose to declare a quorum, upon any de- sion which they may propose to make ainst the validity of any of its laws.

It is to be remembered always that the authority of the court is a purely delegated one. It does not follow, therefore, as a conclusion of reason, from the doctrine that a majority of several joint owners may dispose of the joint property, or because a corporate body may act in the same way in relation to a matter which concerns themselves, that the same rule shall apply to a public trust, except, perhaps, in cases where it is incapable of execution in any other way. The people are entitled to the benefit of the aggregate wisdom of the bench, in the concurring judgments of all those who compose it. The Supreme Court might have been constituted of a single judge, and ought to, and perhaps would have been so constituted but for the proverbial and generally received hypothesis, that wisdom is to be found rather in "the multitude of counsellors" than in the few—not, however, in view of their ultimate disagreement, but to the end that, by comparison and even the possible shock and conflict of opinions, the truth may be evolved and harmony secured, just as in the system of the universe, it is said by the poet, that "all nature's difference makes all nature's peace." It can hardly be supposed that, in the constitution of a bench of eight or nine judges, it was intended that five only of the number should decide, or expected that a sound conclusion could be reached by any result so near an equipoise. To claim for this larger fraction the power of a constructive whole is not too strongly characterized by Mr. Burke, in the passage already cited, as "one of the most violent fictions of positive law that have ever been or can be made on the principles of artificial incorporation," and "cannot be so made, in a Commonwealth, without a positive law to recognize it." There is no law, however, in the present case, except the common law, resting on the reason of the thing, which is only its supposed necessity in ordinary cases; and this, as a mere rule of procedure, not entering into the constitution of the tribunal, and only prescribing a law for its government. If it inhered necessarily in that constitution—if it were of the essence of a court that it should act in all cases by mere majorities—if, in other words, it were strictly definable as a machine whose principle of motion was of that sort only, it might be objected, perhaps, that the Constitution had settled it. But this, I suppose, will hardly be pretended by anybody. In any other aspect of the question, however, it is but a rule of the common law

for the regulation and more effective working of these tribunals; in which case there is nothing, of course, to prevent its abrogation by the power that makes and unmakes the law, in accordance with its own sovereign will, which is only the will of the people declaring itself through their representatives. So long as the authority to decide is still left and still exercisable by the courts, at their own discretion, and upon their own judgments, they have no more right to complain that they are all required to agree in order to nullify the law than that they are not now permitted to do the same thing, as a quasi-corporate body, without the concurrence of a majority of such a quorum as it has pleased the Congress of the United States to indicate.

It is not necessary, however, to either of the pending amendments, to borrow the aid of the general principle that Congress may alter and modify the rule of the common law. The power is to be found in the Constitution itself, so far at least as regards the appellate jurisdiction of the court, which is the whole extent of this bill. That jurisdiction which extends to all cases, except those "affecting ambassadors, other public ministers and consuls, and those in which a State is a party," is conferred only with the express reservation that it shall be exercised and enjoyed "with such exceptions and under such regulations as the Congress shall make." What is the meaning of this language? The word "regulations" imports no more than rules or laws. That it carries with it any power to change the rule of decision, so as to impose another law upon the court than the action of its own judicial mind, or to do anything further than prescribe the *mode* of decision, I do not claim. It will not be disputed, at least, that under this provision it may limit the jurisdiction to such cases as it thinks proper, and settle in its own way the whole process of removal to, and treatment in the appellate court. If it shall think proper, then, to accord that jurisdiction only on the condition that none of its own acts shall be overruled on constitutional grounds without the judgment of an undivided court, who shall gainsay its right so to do, when it may even refuse the jurisdiction altogether where the court below may have affirmed the validity of its enactments?

And now, having fully vindicated, as I trust I have done, the principles of the amendment I have had the honor to submit, covering, as it does, as well the modification on which the Judiciary Committee has agreed, and which in default of the higher security will not be unacceptable to me, I must be allowed a word in conclusion on the reasons which have prompted the introduction and agitation at the present moment of a question that seems, in some measure, to have taken the press and country and even the profession by surprise, as a very novel if not a very bold experiment.

It will be said, perhaps, as it has already been more than whispered in some quarters of the Union, that this alarming proposition is only a mere expedient for the time, intended to serve the purposes of the moment, and with a view only to a particular case; just as the important provision of the tenure-of-office law extending its operation to the heads of Departments, which without much active sympathy or support from any quarter, and only by persevering and persistent effort, and after repeated defeats, I was happily enabled to see engrafted upon this law, against the apparent sense of the Senate and the unyielding opposition of a large portion of the Republican members of this House, has been published to the world through all the organs of public opinion, until it has persuaded everybody here, and the echo of it has come back even from the other side of the Atlantic, as a mere party contrivance to save a particular officer—who was known by me at the time to be himself opposed to it—instead of a great measure of state, prompted by a conviction of the absolute necessity of securing the independence of a set of functionaries who had come to look upon the master of their fortunes as the rightful master of their wills, and intended for all heads of Departments and all time. The impatient urgency with which the pending measure is just now pressed, even in its imperfect shape, after having slept so long undisturbed, may seem to give an air of plausibility to this suggestion. If the fact of its introduction nearly a year ago is not a sufficient answer, I may be allowed to say, at least for myself, that I have never belonged to that timid school of practitioners, which deals only in palliatives, when great public evils which threaten the safety of the State are to be remedied. When I beheld the law obstructed on system, and arrived at the conviction—shared with me by a majority of this House—that the supreme Executive Magistrate of this nation, the officer intrusted under the Constitution with the execution of its laws, instead of performing that duty had disclosed a settled purpose to thwart your measures and defy your will, I was at once prepared to meet

that exigency by the complete and obvious and radical measure of relief, which I thought the Constitution had placed in our hands, instead of resorting to any evasive or circuitous process, any mere experiments of doubtful validity or dangerous example, to accomplish the same object. When I saw again the rare chance, the golden opportunity, of correcting a capital error, canonized in some sort by a practice coevil with the Government, in the concession of the absolute power of removal to the President, which had been so fatally used and abused, I was equally ready to take advantage of the feeling of peril engendered by the usurpations of that officer, for the purpose of accomplishing a long desiderated object, which would have been proper at all times, but had never been possible till now. So when the wild vagaries of the courts, the obvious political leanings of the judges in great affairs of State, and the atrocious and abominable doctrines to which the highest of them was not ashamed to give utterance, had stripped them of the awful prestige—the more than Druidical sanctity—that had surrounded and covered them from the rude gaze of the people—when the very priesthood of the altar itself had drawn aside the curtain of the sanctuary before the eyes of the nation, in a revelation that surpassed in hideousness and horror all that the poet's conception had imagined of the impostor prophet, when he lifted his veil in the presence of his deluded followers and proclaimed in their ears in thunder tones:

"Here, ye wise saints, behold your light, your star!
Ye would be fools and victims, and ye are!"

I was equally prepared to improve the occasion, by striking boldly at the dangerous anomaly of a power in this nation that was higher than its Constitution and its laws. The time had not yet come to do this thing, until the red harvest of death had been gathered from the seed thus sown, in so many battle-fields; but revolutions are the opportunities of statesmen, and he is no statesman who hesitates when the way is providentially leveled before him, and he is thus invited to enter upon it; as he, too, is none, who dreads the idle and unmeaning taunt that he is merely legislating for the evil that is imminent, just as though it were not the business of the statesman to meet the danger that is exigent. In quiet times the chances for reform are rare. The measure now proposed was a proper one at all times. The present condition of the country only demonstrates, through an imminent peril, its absolute necessity.